NO. 19964

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FOR THE NINTH CIRCUIT

THE DREDGE CORPORATION,

Appellant,

vs.

J. RUSSELL PENNY, et al.,

Appellees.

Seeples Vol. 3348

APPELLANT'S CLOSING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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I

INTRODUCTION

A study of appellee's brief herein shows that it does not meet some of the points made in appellant's opening brief.

For instance the government does not answer the argument of appellant that the failure of the Secretary of the Interior to issue regulations for mining locations was unconstitutional. (See page 17 of opening brief)

2. The government ignores the appellant's discussion beginning on page 25, of its opening brief, that the Secretary has in effect repealed the law as to location of mining claims on minerals reserved under the Small Tract Act, and the mining and

removal of such minerals.

3. No response was made by the government in its brief to appellant's contention in its opening brief on page 27, that since no regulations were issued in connection with the location of mining claims on land classified for small tracts, the rights of the locator are subject only to the mining law, 30 U. S. C. A., cited herein, and therefore the 16 Dredge Placer Mining Claims involved herein were valid when located and are now valid.

4. The action by the Secretary in refusing to issue regulations concerning the location and mining of "hard minerals" is in fact a withdrawal of the land, contrary to the rights granted to the prospector by Congress when the Small Tract Act was enacted.

II

ADMINISTRATIVE PROCEDURE ACT

The decision of the Secretary declaring the sixteen mining claims involved in this litigation to be "void ab initio" is illegal and of no effect because there was no notice of contest and no hearing under the Administrative Procedure Act, or otherwise, therefore the decision is not based on any evidence.

Congress in exercising its power over the public domain, on June 11, 1946, passed the Administrative Procedure Act to protect citizens from administrative abuse.

In a decision by the Secretary of the Interior Seaton, on

September 28, 1956, in the case of the United States v. O'Leary, 63 ID 341, at page 345, Secretary Seaton said:

> "Inasmuch as a mining claim is a property claim, which may not be invalidated without due process of law, hearings on the validity of such claims seem clearly to be within the scope of the Court decisions referred to above, holding that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act, even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hearing. In accordance with those decisions, the Department concludes that the hearing requirements of the Administrative Procedure Act are applicable to hearings on the validity of mining claims." (Emphasis added)

The government in its reply brief states on page 17,

> "A public hearing was not required in connection with concluding that appellant's mining claims were null and void."

The government's brief continues on page 17,

> " . . . it would be a pure waste of time, however, to conduct a hearing for the simple purpose of re-determining facts available from the record."

Can the Administrative Procedure Act and former decisions by the Secretary of the Interior regarding that act, be so lightly swept aside? There can be no record where as in this case, there was no hearing and therefore no evidence.

III

BURDEN OF PROOF

It is a fundamental of American jurisprudence that a man is innocent until he is proved guilty. In other words, the prosecution has to prove the man guilty.

Certainly if that is true in criminal matters, it should be true in civil matters. Since the location of a mining claim on lands classified as suitable for small tracts is authorized by Congress, and since a mining claim is presumed to be valid until proved in-valid, the burden of proving such invalidity is upon the Department of the Interior.

It is a fundamental rule of law that violation of the law is not presumed.

It is true that the Department has taken the opposite position in this case, which is contrary to the general rules of mining law, such as that the mining laws must be liberally construed.

Section 1006(c) of the Administrative Procedure Act provides that the burden of proof is on the proponent.

If the Administrative Procedure Act concurred with the

previous rulings of the Department of the Interior that the burden of proof was on the mining claim locator, there would have been no need for this particular provision. It would be surplusage.

That the burden of proof should be on the government is clear, because, a mining claim is presumed to be valid until it is found invalid, and because it is property in the highest sense. This is stated in a decision by the Supreme Court of the United States in Ex rel Wilbur v. Krushnic, 280 U.S. 306, 316, decided in 1930.

There is another rule which supports our position; it is that the law abhors forfeiture. Since Congress has stated that the citizen may locate a mining claim on lands classified as suitable for small tracts, the claim so located is valid until proved invalid. The action by the Department of the Interior in seeking to invalidate the claim, without even a hearing, is an attempted forfeiture. In support of this rule, we cite 58 Corpus Juris Secundum, page 143, and 144.

IV

ARGUMENT

It is obvious that the appellee has taken the position that Congress made a mistake in providing that mining could be conducted on land classified as suitable for small tracts. Therefore the Department felt it was necessary for it to correct this error on the part of Congress by not issuing regulations permitting

mining, and in fact thereby forbidding any mining operations.

That this is appellee's position is shown by the statements contained in its brief, as follows:

Page 8, "absent any regulations to protect the owner of the surface, the land cannot be considered open for mining location."

Page 10, "Instead, Congress left for determination by the Secretary of the Interior, the extent to which reserve minerals would be available for distribution to third parties."

Page 11, "On the other hand, if the small tract remains open for Placer and Lode Mining locations, the small tract purchaser could be completely dispossessed -- and the purpose of the act frustrated."

Page 14, "In essence, then, Congress has left the matter of resolving the conflicts inherent in the separate disposition of land and minerals under the small tract act to the Secretary of the Interior. Under his regulations, the Secretary provides that such minerals may be devloped under the Mineral Leasing Act of 1920, but not otherwise." (Emphasis added)

Page 16, "Only confusion would result from permitting mineral locations with the attendant claim of a right of possession, on land classified for small tract disposition -- ."

In support of its position, the appellee cites the case of Superior Sand and Gravel Mining Co. v. Territory of Alaska, 224 F. 2d 623 (CA 9 1955).

In that case it is shown that Congress has reserved to the

Territory of Alaska, upon survey, sections 16 and 36 of each township for support of the Territorial Schools. Congress further provided that the Territory could lease such school lands for a ten year period. In 1939 such legislation was amended to provide that

> "such land and the minerals therein shall be subject to disposition under the Mining and Mineral Leasing Laws -- upon conditions providing for compensation to any territorial lessee for any resulting damages to crops or improvements on such land."

Such a provision is not contained in the Small Tract Act. It is obvious that the Department of the Interior feels that it must incorporate such a provision into the Small Tract Act by its administration of said Act, contrary to the law as passed by Congress.

The Secretary of the Interior must obey the law as passed by Congress.

The best example of this is cited in Appellant's Opening Brief on page 19. In the case of Jacob A. Harris, 42 LD 611, decided December 13, 1913, on page 614, the Commissioner of the General Land Office states:

> "It is unnecessary to consider so obvious and fundamentally a proposition as that an executive department of the Government has no legislative power, and must leave to Congress and the Courts the rectification of any evil that may flow from its administration of the

law." (Emphasis added)

Proof of the Department's attitude is shown by statements made by H. R. Hochmuth, then Associate Director of the Bureau of Land Management, in a speech he delivered July 17, 1964, at Salt Lake City, before the Rocky Mountain Mineral Law Institute (published in the official volume 10, of the Rocky Mountain Mineral Law Institute beginning at page 467).

Speaking of the mining law, Mr. Hochmuth stated:

> ". . . since that date, the law has been subject to repeated and evolutionary change through precedent and administration."

Then the next sentence reads,

> "There can be no gain saying that the mining law of 1872 is not administered as it was originally written and intended --- " (Emphasis added)

Again, we quote the following startling statement made by Mr. H. R. Hochmuth in the same speech:

> "... the result being that what we are administering today, is not the mining law, but the rather substantial body of legal and quasi-legal precedents which largely are of our own making --- "

Neither the Department of Interior nor a court may alter or amend a law.

(1) Article I of the Constitution of the United States which creates the Legislative Department, begins with this sentance:

"The legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. . . ."

Article II, which creates the Executive Department, in Section 2, contains this clause:

". . . he shall take care that the laws be faithfully executed, . . ."

Article III creates the Judicial Department, which interprets laws passed by Congress.

(2) It is a well-settled rule of law that agency regulations or decisions may not alter or amend a statute passed by Congress which the agency is administering.

For instance, in Stark v. Wickard (1944), 321 U.S. 288, 309, 64 Sup. Rep. 559, 590, the court said:

"When Congress passes an act empowering administrative agencies to carry out government activities, the power of this agency is circumscribed by the authority granted."

For another decision, which involves another attempt by the Department of the Interior to amend a law, see Burke v. Southern Pacific Railroad Co. (1914), 234 U.S. 669, 697 and 705, 58 LawEd. 1527, 34 Sup. Ct. Rep. 907.

In that case the Interior Department inserted in a patent to the Southern Pacific Railroad Co. a reservation of the minerals. Such reservation was not authorized in the law passed by Congress relating thereto.

This is a very long decision, and the Supreme Court of the United States thoroughly considered the question of the Department of the Interior adding to the provisions of various land laws.

At page 697, the Supreme Court quoted, with approval, the following from a decision by a Secretary of the Interior:

> " . . . The exception contained in the patent went beyond 'giving expression to the intent of the Statute' as construed by the Supreme Court, and added a restriction which is not to be found in the granting Act."

Again, at page 705, the court quoted from one of its earlier decisions:

> " . . . The exemptions of the statute cannot be extended by those whose duty it is to supervise the issuing of the patent."

It is possible that the provision of the law allowing mining on small tract lands was inserted by Congress to protect the Secretary in the event he made a mistake and classified mineral land as being suitable for small tract use.

It is possible that regulations regarding mining in such cases could require the mine owner to compensate the small tract owner to the full extent of the purchase price of his small tract as a condition precedent to mining operations.

But for the Secretary to issue regulations that prevent any mining operation is directly contrary to the provision of the small tract law as passed by Congress, and is an attempt of the Secretary by "executive legislation" to nullify an act of Congress.

CONCLUSION

The question in this case is whether Congress or the Secretary of the Interior is the determining factor in making the law.

Congress passes a law, can the Secretary negate it by (1) failing to act, (2) by issuing a regulation contrary to the rights granted by the act of Congress?

Appellant contends that the Secretary must obey the laws passed by Congress, and any regulations contrary to the intent of Congress are a nullity.

Appellant prays:

(1) That the judgment of the District Court granting Defendants' motion for summary judgment be reversed.

(2) That the District Court be directed to find that the classification orders classifying the lands covered by these Mining Claims as suitable for small tract use are illegal and

void.

(3) That the District Court be directed to find that the decision of the Secretary of the Interior is void, and the 16 Placer Mining Claims involved herein are valid.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ George W. Nilsson
GEORGE W. NILSSON